REPORT FOR THE HEARING
in Case C-354/89 *

I — Facts

1. Under Regulation (EEC) No 517/72 of the Council of 28 February 1972 on the introduction of common rules for regular and special regular services by coach and bus between Member States (Official Journal, English Special Edition 1972 (I), p. 143), regular and special regular services are made subject to a system of authorization. Decisions concerning, in particular, applications to introduce a regular or special regular service are taken by common agreement between the Member States within which passengers are taken up and set down. If negotiations designed to reach an agreement between Member States prove unsuccessful, the dispute in question may, at the request of any Member State concerned, be referred to the Commission.

The Commission, after consulting the Member States concerned, must as soon as possible adopt a decision, which must be notified to those States. Article 8 of Regulation No 517/72 provides as follows:

'1. Examination of an application to introduce a regular service or a special regular service shall be for the purpose of establishing that the traffic to which the application relates is not already catered for in a satisfactory manner, both as to quality and as to quantity, by existing passenger transport services.

2. The following, in particular, shall be taken into consideration during the examination referred to in paragraph 1:

(a) the current and foreseeable transport needs which the applicant is planning to meet;

(b) in the case of regular services, the state of the passenger transport market in the areas in question.

3. During the examination referred to in paragraph 1, consideration may be given to whether an equivalent transport service could be organized by undertakings already operating in the areas concerned.'

Article 4(2) of the regulation provides:

'The holder of an authorization shall not, without prior authority from the Member State referred to in Article 12(2), in any way vary the conditions subject to which the service is operated, nor shall he withdraw a service before the period of validity of the authorization has expired.'

Article 12(2) provides that applications to vary the conditions subject to which a service is operated shall be submitted to the Member State in whose territory the headquarters of the undertaking concerned is situated.

* Language of the case: French.

2. On 9 January 1986 Autocars Emile Frisch S. à r. l., a company established under Luxembourg law and having its registered office in Luxembourg (hereinafter referred to as 'Frisch'), submitted to the Luxembourg Government an application for authorization to introduce a special regular service to transport workers from Thil and certain other localities in that part of France to the Villeroy et Boch porcelain factory in Luxembourg (hereinafter referred to as 'Villeroy et Boch'). Frisch proposed to operate two daily services in each direction, departing from Thil at 4.20 a.m. and 12.20 p.m. and from Luxembourg at 2.00 p.m. and 10.00 p.m. respectively in order to transport workers to and from the factory in time for the shifts operating from 6.00 a.m. to 2.00 p.m. and from 2.00 p.m. to 10.00 p.m. Villeroy et Boch, it was claimed, supported the application by Frisch and were prepared to contribute to the transport costs of those workers. On 5 March 1987 Frisch submitted a fresh application to introduce a special regular service which differed from the abovementioned one in that it would also take workers to and from the ARBED factory at Dommeldange. ARBED was not prepared to contribute to the travel costs of those workers.

On 22 January 1986 the Luxembourg Ministry of Transport sought the opinion of the Central Office for Transport Facilities in the Department of Moselle on the application made by Frisch. The French authorities did not agree to that application since they felt that the introduction of the new service might be detrimental to the interests of Schiocchet S. à r. l., whose registered office is at Beuvillers, France (hereinafter referred to as 'Schiocchet'). During discussions between the Luxembourg and French authorities, the latter suggested that the route might be shared by Frisch and Schiocchet. This proposal was rejected by the Luxembourg authorities. On 14 March 1988, the Luxembourg Government, pursuant to Article 14 of Regulation No 517/72, referred the matter to the Commission in order that the latter might decide on the application made by Frisch.

3. The Commission, by Decision 89/524/EEC of 7 September 1989 on a dispute between Luxembourg and France on the establishment of a special regular passenger service between these two States (Official Journal 1989 L 272, p. 18), decided that:

'The competent authority of the Grand Duchy of Luxembourg shall authorize Autocars Emile Frisch S. à r. l. to introduce a
special regular service between Thil in France and Luxembourg for the Villeroy et Boch workforce starting from Thil at 4.20 a.m. and 12.20 p.m. and from the Villeroy et Boch factory at 2.00 p.m. and 10.00 p.m. and serving the following localities:

Thil — Hussigny — Tiercelet — Aumetz — Beuviller — Audun-le-Roman — Serrouville — Errouville — Crusnes — Cantebonne — Villerupt — Audun-le-Tiche — Esch/Alzette — Schifflange — Villeroy et Boch factory.

This service is exclusively for the workforce of Villeroy et Boch, established in Luxembourg at 330, rue de Rollingergrund, L-1018 Luxembourg.'

4. Much earlier, in 1982, by Decision 82/595/EEC of 10 August 1982 settling the dispute between the Grand Duchy of Luxembourg and the French Republic over the renewal of authorizations for certain special regular services (Official Journal 1982 L 244, p. 32), the Commission had resolved a dispute between those two States involving the same companies, Frisch and Schiocchet, over the renewal of authorizations for certain special regular services.

II — Procedure before the Court

5. The application made by Schiocchet was lodged at the Court Registry on 20 November 1989. The written procedure followed the normal course.

6. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

7. Pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court, by decision of 7 November 1990, assigned the case to the Second Chamber.

III — Forms of order sought by the parties

8. *Schiocchet*, the applicant, claims that the Court should:

Declare Commission Decision 89/524/EEC of 7 September 1989 void.

9. The *Commission*, the defendant, contends that the Court should:

Dismiss the application made by Schiocchet;

Order it to pay the costs.

IV — Submissions and arguments of the parties

A — *Admissibility*

10. *Schiocchet* considers that it has an interest in bringing suit for a declaration that Decision 89/524 is void. That decision, it contends, is designed to allow Frisch, a direct competitor of Schiocchet, to introduce a special regular service which would at least partially overlap with services already provided by Schiocchet. Schiocchet's position as an operator of cross-border services would be improved if the contested decision were to be annulled. In those circumstances, Schiocchet believes that it has a sufficient interest in securing the annulment of Decision 89/524.

11. Schiocchet considers that it is directly and individually affected by the contested decision, even though that decision is not addressed to it. The authorization conferred on the basis of Decision 89/524 directly affects Schiocchet by reason of the regular passenger services which the applicant alone operates in the area and which would be in direct competition with the service authorized by the decision at issue. In support of its contentions, Schiocchet refers to the judgment of the Court in Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019.

B — *Substance*

12. Schiocchet begins by arguing that the Commission ought to have taken into account Frisch's 'long tradition of illegality' and the 'consistent and scrupulous compliance by Schiocchet with the applicable rules'.

In support of this submission, Schiocchet points out that since 1970 Frisch has collected Villeroy et Boch workers residing in the border area of France. Frisch operated the following daily services: (1) Luxembourg — Audun-le-Tiche; (2) Luxembourg — Errouville; (3) Luxembourg — Longwy, along with the weekly service Luxembourg — Schifflange. These services constitute international carriage within the meaning of Article 4 of Regulation No 117/66/EEC of the Council of 28 July 1966 on the introduction of common rules for the international carriage of passengers by coach and bus (Official Journal, English Special Edition 1965-1966, p. 177). This type of international carriage ought to have been authorized under Article 2 of Regulation No 517/72. At least during the period 1970 to 1976, Frisch operated this special service without the necessary authorizations, since it was not until 1977 that it applied for such authorizations in respect of the four routes mentioned above. Frisch subsequently obtained at first only provisional authorizations, since the French authorities, following consultation with their Luxembourg counterparts, maintained their refusal to agree to such authorizations, which prompted the Grand Duchy of Luxembourg to refer the matter to the Commission, which decided in favour of Frisch in Decision 82/595.

Furthermore, after being convicted by the French courts for the irregularities complained of by the Commission in Decision 82/595, Frisch failed to comply with the judgments of those courts.

Frisch has also consistently attempted to exceed the limits of the authorizations granted. Thus, since the adoption of Decision 89/524, Frisch has altered, contrary to Articles 4(2) and 12 of Regulation No 517/72, the conditions of operation as defined in the disputed Commission decision. In the first place, it appears from a Villeroy et Boch note dated 28 November 1989 that Frisch departed from Thil at 4.30 a.m. and 12.30 p.m. and from Villeroy et Boch at 2.15 p.m. and 10.15 p.m., whereas the contested decision required it to depart from Thil at 4.20 a.m. and 12.20 p.m., and from the factory at 2.00 p.m. and 10.00 p.m. Secondly, Frisch does not serve all 15 stops specified by the Commission in Decision 89/524. Thus, Frisch no longer serves the localities of Beuvillers, Audun-le-Roman, Serrouville, Thil, Hussigny and Tiercelet. In support of its contention that the latter three stops have been eliminated, Schiocchet relies on the findings of a *huissier* for the day of 27 February 1990 according to which, *inter alia*, Frisch's function is 'to take on passengers at Aumetz and return to Luxembourg'. Alterations of this kind, made unilaterally in breach of Article 4(2) of Regulation No 517/72, justify the withdrawal of the disputed authorization.

Frisch also committed irregularities in the provision of the special regular service which it operated pursuant to Authorization No 211/8/88 issued by the Luxembourg authorities. Frisch, Schiocchet claims, had two coaches to cover this journey simultaneously, the second of which started off only when Schiocchet's coach came into sight, the sole aim being to compete directly with it. All those factors constitute a body of evidence supporting the presumption that Frisch has acted in bad faith vis-à-vis Schiocchet.

Schiocchet, for its part, applied in 1975 for authorization to operate the Boulange — Luxembourg route. It was granted this authorization following the issue of a favourable opinion by the Luxembourg authorities. Schiocchet applied

in 1983, and again in 1985 and in 1986, to extend this service, but it was refused permission to do so. Schiocchet thus refrained from serving the stops specified in the unsuccessful application for extension, which meant that it was not allowed to take on passengers in Luxembourg. Schiocchet fully complied with Community law and the limits of the authorizations granted.

13. Secondly, Schiocchet considers that Frisch is not legally entitled to apply for the exclusive operation of the Thil — Luxembourg service, on the ground that the special regular service proposed by Frisch does not satisfy the criteria set out in Article 8 of Regulation No 517/72 and, more particularly, those contained in paragraph 2(a) of that article.

First of all, with regard to the stops at Aumetz, Errouville, Crusnes and Thil, the Commission ought to have refused to let the Luxembourg authorities grant authorization to Frisch, on the ground that those stops were already served by Schiocchet for the benefit of Villeroy et Boch workers.

Furthermore, with regard to the stops at Beuvillers, Audun-le-Roman and Hussigny, Schiocchet applied for permission to operate a service on 4 February 1985. This application, which related to stops which had not previously been served by Frisch and which was made prior to that of Frisch of 9 January 1986, ought to have been taken into consideration by the Commission when it adopted its contested decision.

Furthermore, by operating the Boulange — Luxembourg service, Schiocchet was meeting a real residual need for a daily service. This service overlapped in part with that between Luxembourg and Thil. In support of this contention, Schiocchet produces 45 attestations from Villeroy et Boch workers who are quite satisfied with the transport provided by Schiocchet. Eleven of those workers, however, suffer inconvenience because of the refusal to grant an extension of the Boulange — Luxembourg service applied for by Schiocchet. The situation is the same for frontier-zone workers employed by the European Community institutions in Luxembourg who are would-be passengers of Schiocchet. These factors ought to have induced the Commission to accept that the services should be shared between Schiocchet and Frisch, as was proposed by the French authorities during negotiations.

Finally, the alterations made by Frisch to the conditions of operation defined in the contested decisions should be taken into account. If it should prove true that Frisch serves only certain localities, such as Beuvillers, Audun-le-Roman, Serrouville, Thil, Hussigny and Tiercelet, this would mean either that the Commission has failed to take account of 'the current and foreseeable' transport needs as provided for in Article 8(2)(a) of Regulation No 517/72, or that Frisch made an initial request for authorization solely in order to damage Schiocchet by misleading the Commission as to the real needs which Frisch intended to satisfy through the new service.

14. Finally, Schiocchet takes the view that the exclusive operation by Frisch of the Thil — Luxembourg service ousts it from that service and creates a monopoly in favour of Frisch. This, it is argued, is particularly unfair because from Errouville the service in question follows the

Boulange — Luxembourg route operated by Schiocchet, the route in question is one along which Schiocchet alone has put its authorization to proper effect and, finally, the route is a natural extension of the Boulange — Luxembourg route in respect of which Schiocchet applied for authorization before Frisch. The Boulange — Luxembourg service is the only one operated by Schiocchet, whereas Frisch operates four. This imbalance is aggravated by the fact that Villeroy et Boch puts pressure on its employees to use the service provided by Frisch. Even if Community rules in respect of international transport were designed to ensure that services should be organized in accordance with needs, while maintaining normal conditions of competition, such rules should not have the effect of reducing to the point of non-existence the services offered by a transport company which has always taken pains to comply with such rules. The contested decision has the direct and immediate effect of removing all competition with Frisch, which thus finds itself in fact and for the future in a monopoly situation. The Commission's decision simply ousts Schiocchet. Conditions of normal competition in the coach transport sector in this region can no longer be assured.

15. The *Commission* points out that from 21 January 1977 Frisch had benefited from regular authorizations to operate four cross-border services, authorizations which France had subsequently refused to renew. Since 10 August 1982, Frisch has once again benefited from regular authorizations and in so far as the submission alleging unlawful behaviour on the part of Frisch refers to events predating Decision 82/595 it is to be rejected since that decision had the effect of rectifying Frisch's position.

The Commission takes the view that the submission is unfounded in so far as it refers to events which occurred after the adoption of Decision 82/595.

With regard to irregularities committed between 1982 and 7 September 1989, the Commission considers that it could not let considerations based on the alleged 'unlawful behaviour' of Frisch override those arising from an examination of transport requirements and the adequacy of the service envisaged to meet those needs. The French authorities appear to share this point of view since they suggest, in the document submitted to the Commission under the procedure which led to the contested decision, a partition of the route between Frisch and Schiocchet and do not refer to any 'unlawful behaviour' on the part of Frisch. Schiocchet, the Commission contends, has failed to supply any evidence to substantiate its allegation that one of the four routes referred to in Decision 82/595 was operated on an irregular basis. In any case, Frisch discontinued the irregular operation of the Boulange-Luxembourg route on 28 July 1982.

With regard to events which have occurred since the adoption of Decision 89/524, the Commission considers that the legality of a decision must be assessed in the light of the circumstances of fact and law which existed when the decision was adopted. Such circumstances can justify the annulment of the contested decision only if they reveal a manifest error of judgment on the part of the Commission. This cannot be the case as regards the alterations to the departure times from Thil and from the factory, since a time difference of 10 to 15 minutes does not undermine the purpose of the authorization and it is not certain whether vari-

ations of this kind may be regarded as being subject to the procedure set out in Article 12(2) of Regulation No 517/72. Neither is it the case with the alterations of service concerning some of the 15 scheduled stops. The system set up by Regulation No 517/72 is a system of authorization which provides for points at which passengers may be taken on board but which imposes no obligation in this regard. Such an authorization bestows a facility to provide a service for the localities stated, taking account of current and foreseeable requirements, but does not thereby impose an obligation to serve all the stops mentioned. In the present case, the authorization granted to Frisch was valid for a period of two years and it was possible that requirements might evolve and make it necessary to serve the areas mentioned by Schiocchet. It would be premature to conclude, on the basis of the inclusion within the itinerary set out in the contested decision of the localities of Beuvillers, Audun-le-Roman and Serrouville, that there has been a manifest error of judgment on the part of the Commission. In any case, the elimination of the stops at Thil, Hussigny and Tiercelet on 27 February 1990 might have been due to special circumstances such as, for example, holiday periods or sickness on the part of workers using those stops. The application seeking withdrawal of the authorization in question goes beyond the scope of the action begun before the Court by Schiocchet's application.

So far as concerns the alleged irregularities relating to a route operated pursuant to Authorization No 211/8/88, the Commission notes that this authorization, which preceded the contested decision, relates to a route other than that authorized by the decision in question. In any event, the fact that Frisch uses two coaches on this other route does not appear to be at variance with Authorization No 211/8/88, which stipulates that 'various coaches of the undertaking' (Frisch) may be used. Furthermore, the use of two vehicles may be justified in view of the number of potential passengers.

16. The Commission maintains that it adopted Decision 89/524 in accordance with the principles set out in Article 8 of Regulation No 517/72.

The Commission notes that the traffic to which the application related was not already catered for by existing passenger transport services because there was no service at times which corresponded to the arrival and departure of shift workers at 6.00 a.m. and 2.00 p.m. and a number of stops were not catered for at all by any service. In this connection, the Commission refers to the ninth recital in the preamble to the contested decision which states that the special regular service proposed by Frisch 'fulfils a proven need for a new service both quantitatively and qualitatively in the area since it will provide a service at convenient times for some 50 workers who at present do not have public transport to the Villeroy et Boch factory to arrive for and return from the 6.00 a.m. and 2.00 p.m. shifts; ... the service will call at certain places with at present no public transport at that time'.

The Commission considers that it took proper account of the qualitative aspect of the proposed service when it noted, in the eleventh recital, that 'a special regular service ... is the most appropriate form of service for Villeroy et Boch employees since it can be easily adapted to meet their needs'.

In its view, it gave due consideration to the issue of 'whether an equivalent transport service could be organized by undertakings already operating in the areas concerned', within the meaning of Article 8(3) of Regulation No 517/72. The Commission points in this regard to the twelfth recital in the preamble to the contested decision, which states that 'the timetable for the special regular service proposed by Autocars Emile Frisch S.à r. l. is more convenient and the service takes less time than that of the regular service envisaged by Schiocchet for the 6.00 a.m. shift of the Villeroy et Boch workforce; . . . Schiocchet does not envisage any service to cater for workers on the 2.00 p.m. shift at the Villeroy et Boch factory'. The Commission adds in this connection that the partition of the routes between Frisch and Schiocchet, as advocated by the French authorities, could only have applied to the morning service, which was the only one envisaged by Schiocchet, and that the conditions offered by Frisch for this service were more suitable to meet existing requirements than those proposed by Schiocchet.

With particular regard to the 'current and foreseeable transport needs' under Article 8(2)(a) of Regulation No 517/72, the Commission points out that even if Schiocchet actually served the stops at Aumetz, Errouville and Crusnes, Frisch also provided this service. The Commission adds that Schiocchet operated this service only at such hours as enabled passengers to be in Luxembourg at 6.45 a.m., whereas Frisch operated a service which would enable them to arrive in Luxembourg both at 5.45 a.m. and at 6.45 a.m. The Commission concludes that, even though Schiocchet alone served Thil, it did so only at a time which enabled passengers to be in Luxembourg at 6.45 a.m., rather than 5.45 a.m., and that this was of no use to workers on the 6.00 a.m. to 2.00 p.m. shift. The argument based on the fact that Schiocchet's passengers included workers from the Villeroy et Boch factory has no relevance whatsoever.

Turning to the 45 attestations produced by Schiocchet in support of the contention that it satisfied a residual daily requirement, the Commission notes that if the 11 dissatisfied employees work on the 6.00 a.m. shift their needs are satisfied by the service provided by Frisch and that if they begin their work at a different time there was no need to consider their needs in the examination carried out by the Commission into the need for a service for workers on the 6.00 a.m. to 2.00 p.m. shift.

As for Schiocchet's argument that its application for an extension was made at an earlier stage, the Commission notes that, according to the wording of Article 8 of Regulation No 517/72, no account is to be taken of the order in which applications are submitted. Moreover, the application for an extension by Schiocchet related only to Hussigny, whereas the contested decision relates to 15 stops, three of which had been served neither by Frisch nor by Schiocchet. In any case, the application made by Schiocchet would not have allowed that transport undertaking to serve Beuvillers and Audun-le-Roman or to meet all of the geographical requirements covered by the contested decision. In addition, since Schiocchet's application for an extension did not specify arrival times at Hussigny, it would have been quite unlikely that the planned stops by that company would have covered the same timetable requirements as those proposed by Frisch, which, unlike Schiocchet, envisaged a stop for the 2.00 p.m. shift.

The Commission adds that the request made to it was for a service for Villeroy et Boch workers on the 6.00 a.m. and 2.00 p.m. shifts and that it did not have to take any account of the needs of potential passengers consisting of workers who clean the offices

of the European Community institutions in Luxembourg after officials have left. Such requirements bear no relation to those of Villeroy et Boch workers and the sharing arrangement suggested by the French authorities would not have made it possible to satisfy those needs because Schiocchet envisaged only one morning service and none at all in the evening.

17. The Commission emphasizes that the application made by Frisch related to the introduction of a special regular service and for that reason did not have to be examined in the light of 'the state of the passenger transport market in the areas in question' within the meaning of Article 8(2)(b) of Regulation No 517/72, applicable to applications concerning the introduction of a regular service within the meaning of Regulation No 117/66. Consequently, the submission made by Schiocchet to the effect that the contested decision creates a monopoly in favour of Frisch lacks any foundation.

Furthermore, this submission is unfounded because the service operated by Schiocchet on the Boulange — Luxembourg route differs from that operated by Frisch pursuant to the contested decision. In the first place, the service provided by Schiocchet is intended for anyone interested in using it, whereas that offered by Frisch concerns only Villeroy et Boch workers. Secondly, it provides collection at later times which could be of interest for workers on normal hours. The recently created service does not compete directly with that operated by Schiocchet. The 'market' in which it operates is different and does not overlap with that in which Schiocchet operates. The granting to Frisch of the authorization which Frisch has requested for the Thil — Luxembourg route therefore does not have the effect of leading to the creation of a monopoly situation.

G. F. Mancini
Judge-Rapporteur